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No. 94-1990

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
PETITIONERS,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

REPLY BRIEF OF PETITIONERS

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On Petition for a Writ of Certiorari to the
Supreme Court of the State of Oklahoma

REPLY BRIEF OF PETITIONERS

In the Petition for a Writ of Certiorari, Petitioners demonstrated that the Oklahoma tax officials intentionally and arbitrarily assessed railroad carriers and air carriers at a lower rate than pipelines in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, in conflict with the decisions of this Court and with the decision of the Nebraska Supreme Court. Both the Oklahoma court and the tax officials point to Congress as the impetus for the discriminatory treatment. Petitioners have shown that this blame is misplaced. Although Congress enacted two anti-discrimination statutes, the state tax officials could have complied with both the federal statutes and the federal constitution. The state tax officials chose to comply only with the federal statutes and ignored the Equal Protection Clause.

Respondents' Brief in Opposition fails to support denial of the Petition for a Writ of Certiorari for the following reasons.

1. The Equal Protection Clause mandates that similarly situated persons must be treated the same absent a rationally based legitimate state interest. *Nordlinger v. Hahn*, 120 L. Ed 2d 1, 13 (1992). Respondents claim that their state interest is compliance with federal statutes. Petitioners do not dispute that compliance with federal statutes may in some circumstances constitute a legitimate state interest. Here, however, the state tax officials chose a method of compliance that is not rationally related to the stated goal of compliance.

Respondents claim that the federal statutes, the 4-R Act[1] and TEFRA,[2] made it unlawful for Oklahoma to continue to classify and tax railroad and airline property as public service corporations property. [Brf. Opp. at p. 6]. This is simply not the case. The federal statutes merely prevent the states from certain tax actions which result in railroad carriers and air carriers being taxed more than commercial and industrial property.[3] The states have large leeway in creating their tax systems, so long as the states do not violate the federal constitution. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)(quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959)). Congress and the state legislature left it up to the state tax officials to administer their tax systems fairly and lawfully.

One Oklahoma statute, which has not been expressly amended by the state legislature, classifies property into tax classes, one of which is public service corporations. Okla. Stat. Ann. tit. 68, § 2803 (West 1992). Another Oklahoma statute, which also has not been expressly amended by the state legisla-

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[1] 49 U.S.C. § 11503 (1988).

[2] 49 U.S.C.A. § 40116 (West Supp. 1995).

[3] For relevant text of the 4-R Act and TEFRA, see the Petition at pp. 10-11.

ture, defines the public service corporations class to include air carriers, railroad carriers and pipelines. *Id.* § 2808. Another Oklahoma statute grants the state tax officials the authority to assign assessment ratios for members of the public service corporation classification. *Id.* § 2802(26). The Oklahoma Constitution permits assessment ratios to vary at the discretion of the tax officials between 0% and 35%. Okla. Const. art. X, § 8. Following passage of the 4-R Act and TEFRA, the Oklahoma legislature passed a statute that basically repeated the directives of those federal statutes, prohibiting the state tax officials from choosing assessment ratios for railroad carrier and air carrier property which exceed those chosen for commercial and industrial property.[4]

Despite the language of Section 2864(C), the Oklahoma court interpreted it to create a tax subclass for railroad carrier and air carrier property within the class of public service corporations. Petitioners disagree. Nevertheless, whether or not Section 2864(C) created a subclass, the Equal Protection analysis does not stop there. Even if a subclass was created, Section 2864(C) does not mandate that the state tax officials assign unequal assessment rates between the subclassed public service corporations and the other similarly situated public service corporations. Given their great leeway under Oklahoma law, the state tax officials had two ways of complying with state laws, the federal statutes and the federal constitution. First, the state tax officials could have raised the assessment ratio for local commercial and industrial property to equal the ratio for railroad

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[4] Section 2864(C) provides:

> In determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value of the locally assessed commercial/industrial real property of the state.

Okla. Stat. Ann. tit. 68, § 2864(C)(West 1992).

carriers, air carriers, and pipelines. Second, the state tax officials could have lowered the assessment ratio for railroad carriers, air carriers, and pipelines to equal the ratio for local commercial and industrial. Yet the state tax officials chose a third way — lowering ratios for railroads and air carriers but assessing pipelines at a higher ratio. This third way does not comply with the federal constitution. Although it was clearly within their power to assess in a nondiscriminatory manner, the state tax officials chose not to. Thus, it is the actions of the state tax officials that unconstitutionally discriminate. Their choice to assess pipelines differently from railroad carriers and air carriers was not rationally related to the proffered goal of federal compliance because it was not mandated by the federal statutes and because nondiscriminatory methods of compliance were available.

2. Another reason that the disparate treatment by the state tax officials is not a rational means for complying with federal law is because the disparity benefits local commerce at the expense of interstate commerce. Courts have long recognized that railroads' high rates of fixed investment and their immobile assets have left them less able than other interstate enterprises to restrain state taxation by threatening to pull up their stakes and leave. *See Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991). Recognizing the plight of these interstate common carriers, Congress enacted the 4-R Act and TEFRA to protect them from disproportionately heavy state and local tax burdens. *See Department of Revenue of Oregon v. ACF Indus., Inc.*, 127 L. Ed. 2d 165 (1994); *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 125 (1987). The 4-R Act and TEFRA plainly require states to readjust their tax arrangements to the extent those arrangements discriminate and create an undue burden on interstate commerce. Congress stated in those statutes that the commercial and industrial class is the comparison class for determining if a state tax is discriminatory

or burdensome. Thus, a state may not treat its local commerce more favorably than interstate commerce.

Petitioners are no different than railroads in that they are common carriers that transport goods for hire in interstate commerce. Like railroads, Petitioners' high rates of fixed investment and their immobile assets subject them to the whim of the state and the taxing officials. The tax officials had nondiscriminatory means for compliance with the federal statutes and state law — they could have raised the assessment ratios for local commerce or lowered the assessment ratios for interstate commerce — but instead, they chose to arbitrarily discriminate against Petitioners and against interstate commerce. This Court has stricken classifications that discriminate against interstate commerce in favor of local commerce as being in violation of the Equal Protection Clause. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985)(promotion of domestic business by discriminating against nonresidents is not a legitimate state purpose); *Williams v. Vermont*, 472 U.S. 14, 23 (1985)(discriminatory use tax exemption for in-state purchases does not further legitimate state objective).

3. Respondents attempt to circumvent a proper analysis under the Equal Protection Clause by claiming that pipelines are no longer similarly situated with railroad carriers and air carriers because the state has placed them in a separate tax subclass. Apparently, Respondents believe that simply by creating a tax subclass for railroad carriers and air carriers the state magically destroyed the former similarity among these taxpayers and Petitioners. If this were true, a state could avoid any challenge under the Equal Protection Clause simply by creating statutory subclassifications. Respondent's contention completely undermines equal protection principles.

The Equal Protection Clause focuses on the treatment given to similarly situated taxpayers, whether or not they are placed in the same tax class or subclass. *See, e.g., Rinaldi v.*

Yeager, 384 U.S. 305, 308 (1966)(equal protection requires more of a state law than nondiscriminatory application within the class it establishes); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). This Court has routinely stricken classifications that place similarly situated persons in different classes as contrary to the Equal Protection Clause where there is no rationally based legitimate state interest. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985). Respondents offer as their only distinction the existence of federal statutes that, without more, could not operate as the requisite rationally based legitimate state interest.

In order to pass constitutional muster, the subclass must be supported by pre-existing differences. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981)(quoting *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493-94 (1927)); *Williams v. Vermont*, 472 U.S. at 27; *F.S. Royster Guano Co.*, 253 U.S. at 415. In this case, it is undisputed that there were no pre-existing differences among railroad carriers, air carriers, and pipelines. The Oklahoma court recognized that absent the federal statutes, pipelines are similarly situated with railroad carriers and air carriers. [Opinion, Pet. App. at p. A-9]. Indeed, Oklahoma has classified and assessed these taxpayers the same because they are alike. The mere existence of a federal statute does not in and of itself excuse trampling on Petitioners' rights to be treated equally under the laws — there must also be relevant pre-existing differences among the taxpayers. A federal statute may not alone constitute the basis for separate classification of similarly situated taxpayers.

Respondents claim that these taxpayers are no longer similarly situated because some have federal "protection" by act of Congress and Petitioners do not. Congressional inaction cannot suffocate constitutional rights. *Davis v. Passman*, 544 F.2d 865,

872 (5th Cir. 1977). When Congress expressly prohibits discrimination against one person but is silent concerning another similarly situated person, such silence does not constitute permission to discriminate against the other person. A federal anti-discrimination statute should not be used by the states to justify further discrimination among taxpayers who are alike. Such bootstrapping eviscerates the Equal Protection Clause and renders it meaningless in the economic context.

First and foremost, the states and their agencies and officials must obey the United States Constitution. *Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987)*; *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989). Under the Supremacy Clause, the United States Constitution is the supreme law of the land. U.S. Const. art. VI, cl. 2. States are required to follow federal law, whether statutory or constitutional, but when a federal statute conflicts with the federal constitution, the constitution prevails. *Younger v. Harris*, 401 U.S. 37, 52 (1971); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress is subject to equal protection parameters pursuant to the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Thus, Congress cannot override the Equal Protection Clause and may not authorize states to violate the Constitution. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Neither Congress nor a state can validate a law that denies the rights guaranteed by the Fourteenth Amendment. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982), *Graham v. Richardson*, 403 U.S. 365, 382 (1971). States may not hide behind a federal statute when confronted with the Equal Protection Clause.

5. Respondents attempted to brush aside the conflict between the Oklahoma Supreme Court and the Nebraska Supreme

Court's decision in *Northern Natural Gas Co. v. State Board of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990). Respondents attempted to distinguish *Northern* by arguing that Nebraska places railroad carriers and pipelines in the same class, in contrast to Oklahoma, which has created a separate subclass for railroad carriers and pipelines by enacting Section 2864(C). [Brf. Opp. at p. 8-9]. Even if the Oklahoma court was correct in finding that Section 2864(C) created a tax subclass, the existence of a formal classification system is the beginning rather than the end of the Equal Protection analysis.

In *Northern*, railroads had the 4-R Act as "federal protection" and pipelines did not. Despite the "federal protection" given to railroads, the Nebraska court held that railroads and pipelines are similarly situated, and therefore, must receive the same tax treatment under the Equal Protection Clause. 443 N.W.2d at 256.[5] Respondents and the Oklahoma court ignored this similarity, focusing instead on the subclassification. The differences in the classification systems of Nebraska and Oklahoma are not relevant to the federal Equal Protection analysis. Respondents were required to comply with federal laws before enactment of Section 2864(C) and Respondents are required to comply with federal laws after enactment of Section 2864(C). Nothing has changed. The state must still treat similarly situated taxpayers the same despite any arbitrary classifications it makes.

The *Northern* court required the state tax officials to comply with both the federal statute and the federal constitution — the Oklahoma court did not. There is a direct conflict between the supreme courts of Nebraska and Oklahoma.

6. Finally, Respondents claim that Petitioners are trying to extend the scope of the 4-R Act and TEFRA to include them. Petitioners, however, are instead trying to enforce their rights

[5] Ironically, railroads are far more similar to pipelines than they are to commercial and industrial property.

under the Equal Protection Clause. These rights are independent of any Congressional action or inaction.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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